6-28-1976

City of Louisville, Kentucky v. The Women's Club of Louisville

Reply Brief 1976-SC-0298

REPLY BRIEF

3870

SUPREME COURT OF KENTUCKY

No. 76-298

CITY OF LOUISVILLE, KENTUCKY - Appellant

versus

THE WOMAN'S CLUB OF LOUISVILLE - Appellee

Appeal from Jefferson Circuit Court

REPLY BRIEF FOR APPELLANT

BURT J. DEUTSCH
Director of Law

CARSON P. PORTER
EDWARD S. CARLE
SALLIE S. HAYNES
Assistant Directors of Law
200 City Hall
Louisville, Kentucky 40202
Counsel for Appellant

This is to certify that a copy of this Brief has been served on the adverse party, W. Scott Miller, Jr. and the trial judge, Hon. Thomas A. Ballantine, Jr. pursuant to RAP 1.250.

Carson P. Porter
Counsel for Appellant

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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SUPREME COURT OF KENTUCKY

No. 76-298

CITY OF LOUISVILLE, KENTUCKY - - *Appellant*

v.

WOMAN'S CLUB OF LOUISVILLE - - *Appellee*

REPLY BRIEF FOR APPELLANT

ARGUMENT

I. Historic Preservation as an Object of Condemnation is a Valid Exercise of Eminent Domain Authority, and the Instant Case Constitutes an Appropriate Application of Such Eminent Domain Authority.

This case comes before this Honorable Court as a result of the Appellant's attempts to preserve two properties located in the heart of the Old Louisville Historic District. It is true that Appellant is not attempting to preserve a civil war battlefield (*United States* v. *Gettysburg Electric Railway Co.,* 160 U. S. 668, 40 L. Ed. 576, 16 S. Ct. 427 (1861)), an Indian reservation (*Roe* v. *Kansas, ex. rel. Smith,* 278 U. S. 191, 73 L. Ed. 259, 49 S. Ct. 160 (1929)), the Star Spangled Banner Flag House (*Flaccomio* v. *Mayor and City Counsel of Baltimore,* 71 A. 2d 12 (Md. 1950)), or the Mary Todd Lincoln Home (*Coke* v.

Commonwealth, Department of Finance, Ky., 502 S. W. 2d 57 (1974)). But the power upheld in those cases is not as circumscribed as Appellee would represent. As early as 1896, the United States Supreme Court, having ratified the Gettysburg taking, admonished:

> No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred. *United States* v. *Gettysburg Electric Railway Co., supra,* at 683.

Appellee attempts similarly to negate the import of *Berman* v. *Parker,* 384 U. S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954) by accusing Appellant of "substitut(ing) a case involving Urban Renewal and Slum Clearance in the District of Columbia and the removal of blight, for the preservation of blight in the City of Louisville" (Appellee's Brief, p. 8). Appellant, of course, cited *Berman* v. *Parker* for the proposition that aesthetic considerations, one of which is historic preservation, are proper in the exercise of the eminent domain authority. Moreover, as pointed out in the Amicus Curiae Brief at pages 29-30, there is a strong similarity of purpose between the Kentucky Urban Renewal Statute (KRS 99.020) and Appellant's Historic Preservation Ordinance. TR 8. It is indeed

significant that the Federal Urban Renewal Statute has been amended to make historic preservation an Urban Renewal function.

In Kentucky, the protection of the aesthetics of the community recognized in *Berman* v. *Parker* has been strongly approved. See *Jasper* v. *Commonwealth,* Ky., 375 S. W. 2d 709 (1964). The Court in *Jasper* upheld the "State Junk Yard Act" because it recognized that the police power "is as broad and comprehensive as the demands of society make necessary (and) must keep pace with the changing concepts of public welfare. *Id.,* at 711. It is precisely the *changing* concept of public welfare that Appellee fails to understand. In 1896, there was a need to commemorate a civil war battlefield. In the 1970's, there is a need to preserve more than isolated remnants of the past. In 1966, the Congress of the United States declared that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." National Historic Preservation Act of 1966, 6 U.S.C. §470 (1974).

The City of Louisville does not have a civil war battlefield within its boundaries, nor does it have an Indian reservation, a Star Spangled Banner Flag House or a Mary Todd Lincoln Home. What it does have is the Old Louisville Historic District, the significance of which has been recognized by the National Trust for Historic Preservation and by the Kentucky Heritage Commission as well as by Appellant's Landmarks Commission. Preservation of this historic dis-

trict is much more than a hobby for history buffs. It is an integral part of what Louisville Mayor Harvey I. Sloane has termed "urban conservation." Urban conservation is the total program directed toward the revitalization of the city's core, and it is a program followed by city after city in the face of declining population and decreasing tax revenues. Urban conservation places a premium on upgrading the attraction of the inner city. Historic preservation is a key component of urban conservation. It benefits the city economically in a number of ways, as ably identified in Amicus' Brief at pages 17-19.

Appellant strongly disputes Appellee's contention that the instant action constitutes a "confiscation of property and the taking of private property for private use" (Appellee's Brief, p. 11). Appellee grounds this argument on an excerpt from a speech by Mayor Sloane to the Woman's Club on January 29, 1975:

> . . . Under existing ordinances, the City is empowered to file a suit for possession of these houses, to pay a court-determined price of purchase. I don't want to do this; I don't want to think about doing it. I want to see if we can continue our negotiation in good faith. However, I am confident that if we are forced to take such an action, the homes can be resold to private groups or persons who will agree to maintain and reuse them for the benefit of the neighborhood. TR 50.

Appellee interprets the final sentence to mean that the proposed condemned property will be "resold to private citizens to be used for residential purposes" (Ap-

pellee's Brief, p. 8). Clearly the Mayor made no reference to any residential use by private citizens; rather he expressly conditioned any resale (which is in any case totally speculative at this juncture) on an *agreement to maintain and reuse them for the benefit of the neighborhood.*

Appellee errs also in stating that Appellant "has never said it wants the houses for any use, let alone a municipal or public use (but) just doesn't want Appellee to exercise its right to use its own property as it sees fit in a legal manner" (Appellee's Brief, p. 10). In the petition initiating the instant action, Appellant stated:

> It is necessary for the (Appellant) to acquire the land, buildings and/or materials of the (Appellee), as same is more particularly described herein, all of which is in the public interest, necessity and convenience for effectuating the municipal and/or public purpose of preserving, protecting and/or perpetuating neighborhoods, areas, places, structures and improvements having a special or distinctive character or a special historic, aesthetic, architectural, archaeological, and/or cultural interest or value and which serve as visible reminders of the history and heritage of this City, Commonwealth or Nation. TR 5.

Moreover, the City of Louisville is empowered by virtue of KRS 83.420 to ". . . acquire property for municipal purposes by purchase or otherwise . . . (and) may use, manage, improve, sell and convey, rent or lease its property." It is clear that the transfer of condemned property to a private owner is neither

improper nor illegal if the purposes of the taking are thereby fostered. *Port Authority* v. *Grappale,* 202 N. W. 2d 371 (Minn. 1972); *United States* v. *Marin,* 136 F. 2d 388 (9th Cir. 1943). Such transfer is a general method of operation under urban renewal statutes. *Gibson & Perin Co.* v. *City of Cincinnati,* 480 F. 2d 936 (6th Cir. 1973). See Amicus' Brief, pages 29-30.

Appellee is correct in stating that the sovereign power of eminent domain may not be employed to condemn for strictly private use. In support of that proposition, Appellee relies upon *Brest* v. *Jacksonville Expressway Authority,* Fla., 194 So. 2d 658 (1967) and *Boyd* v. *C. L. Ritter Lumber Co.,* 119 Va. 348, 89 S. E. 273 (1916) (Appellee's Brief, p. 12). However, both decisions are distinguishable from this case because in both the public retained absolutely no control over and received absolutely no benefit from the property condemned. Moreover, in both cases the power of condemnation had been delegated by the municipal authority to a sub-agency and a private company, respectively.

Boyd, decided in 1916, rests on a much narrower construction of the public use/benefit concept than is now accepted. At least since *Berman* v. *Parker, supra,* judicial approval of a broader interpretation of the public use/benefit concept has been clear:

> . . . Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project taking from one businessman for the benefit of

> another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. (Citations omitted.) The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. 348 U. S. 26, at 33.

As the Amicus Brief correctly notes, there is no difference between achieving the public purpose, under the Urban Renewal Statute, by selling cleared land to private individuals and achieving the public purpose, under the Historic Preservation Ordinance, by selling historic structures, subject to restrictive covenants, to persons who are willing to preserve them. By means of the restrictive covenants requiring continued preservation of the historic structures, the City would be retaining a property interest in the structures. Such a situation would be quite similar to that already approved by this Court in *Coke* v. *Commonwealth of Kentucky, Department of Finance, supra,* where the use of private funds to purchase the property being condemned was upheld so long as the public purpose of preservation was effected.

II. Since the Instant Case is a Condemnation Action Brought by Appellant Pursuant to Its Grant of Eminent Domain Authority, the Question of the Constitutionality of the Historic Preservation Ordinance is Not Justiciable.

The controversy over the Victorian homes is not moot. Of course the impetus for this action was the Historic Preservation Ordinance, but it was because the Ordinance by its own terms *ceased to have effect* that the lawsuit was begun. Appellee cites Section 8e(2) of the Ordinance which indeed "refers to Condemnation" (Appellee's Brief, p. 13). Appellee neglects to report that is *all* the Section does. In fact, the Landmarks Commission is given no eminent domain authority whatsoever. Appellee also neglects to cite Section 8f immediately following the reference to condemnation, which directs the Commission to issue a notice of right to proceed after the expiration of the waiting period authorized under Section 8e. Appellant is forced to reiterate the obvious: by the terms of the Ordinance, the Commission must release the property of any applicant with whom it cannot reach agreement after a negotiating period of six months.

Appellant hardly "ignores" Section 14 of the Kentucky Constitution and the teaching of *Kendall* v. *Beiling,* 295 Ky. 782, 175 S. W. 2d 489 (1943), as Appellee alleges at page 14 of its Brief. Appellant respectfully submits that if Appellee wished to take issue with the provisions of the Ordinance, it had only to contest the jurisdiction of the Landmarks Commission prior to the expiration of that jurisdiction on

March 4, 1975. After March 4, the controversy between the Landmarks Commission and Appellee ceased to exist. Appellee's sole remedy at this point is against the City of Louisville, and its challenge must be confined to this eminent domain proceeding. Appellant agrees that this is a "real and not pretended controversy" regarding a "broad question of public interest" (Appellee's Brief, p. 16). The controversy between the City of Louisville and The Woman's Club is a live one, but the Landmarks Commission and the Ordinance under which it operates are not relevant. Furthermore, contrary to Appellee's contention at page 17 of its Brief, Appellant does not argue that Appellee should be foreclosed from raising the questions of appropriate use and good faith negotiation. Findings on those issues are required under KRS 416.470 (2)(a). The fact that the Court below failed to make the required finding supports Appellant's contention that the lower court erred in reaching the constitutional issue.

III. The Historic Preservation Ordinance is Constitutional on Its Face and as Applied to This Appellee.

Appellant respectfully submits that it has fully treated the issue of whether failure to provide a specific right of appeal in legislation creating a regulatory scheme such as that set forth in the Landmarks Ordinance is fatal to the legislation. Appellee itself relied upon *Kendall* v. *Beiling, supra* (Appellee's Brief, p. 14). Thus, Appellant must conclude that

Appellee recognizes that specificity is not required. Moreover, as noted at page 7 of the Amicus Brief, many historic district ordinances do not provide for judicial review.

The real thrust of Appellee's argument seems to be that the Ordinance was applied arbitrarily to its demolition application. Appellee seemingly recognizes that judicial review of arbitrary administrative acts is always available. In fact, Appellee cites *American Beauty Homes Corp.* v. *Louisville and Jefferson County Planning & Zoning Commission,* Ky., 379 S. W. 2d 450 (1964), for the same proposition as did Appellant: that "review was possible where an act was found to be arbitrary" (Appellee's Brief, p. 18). Appellee admits, however, that it ". . . chose not to attack the ordinance but wait the 6-month period required." When Appellee finally "took the posture of 'defending itself,'" the trial court, according to Appellee, "found that the ordinance and the manner in which it was applied to the Appellees was arbitrary" (Appellee's Brief, pp. 18-19). For the record, Appellant must remind this Court that the Opinion and Order entered below contain no such finding. At best, the Court below faults the Ordinance for failure to "grant any right of appeal from what *may be* an arbitrary or capricious denial of the certificate." TR 122. (Emphasis added.)

What apparently offends Appellee is something it calls "the delegation and redelegation of authority granted to committees of the Landmarks Commission" (Appellee's Brief, p. 19). As examples of such "dele-

gation and redelegation," Appellee points to matters extraneous to the instant case, such as color charts (Appellee's Brief, p. 19).* The Court should note that Section 2(e) and (g) of the Ordinance permit the Commission to adopt bylaws for the transaction of its business but require that all rules and regulations adopted by the Commission to carry out its functions under the provisions of the Ordinance be submitted to the Board of Aldermen for approval or rejection. TR 11-12.

Appellee's attempt to distinguish the cases cited by Appellant which have upheld ordinances relating to historic preservation as proper under the general public welfare and police powers is unsuccessful. Again Appellee fails to recognize that historic preservation involves more than saving isolated famous landmarks. The Court in *City of New Orleans* v. *Pergament,* 198 La. 852, 5 So. 2d 129 (1941), used the phrase *"tout ensemble"* to explain the broader concept of historic preservation:

> The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish Quarter, the *tout ensemble,* so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance. The preservation of the Vieux Carre as it was originally is a benefit to

*Since Appellee has raised the question, this Court should be advised that no applicant "must use" approved color palettes. The color charts were adopted (after specific approval by the Board of Aldermen of the concept in Ordinance No. 22, Series 1975) so as to make possible speedy administrative approval for exterior painting.

> the inhabitants of New Orleans generally, not only for the sentimental value of this showplace but for its commercial value as well, because it attracts tourists and conventions to the city and is in fact a justification for the slogan, 'America's most interesting city.' *Id.*, at 131.

Appellee would distinguish *Maher* v. *City of New Orleans,* 371 F. Supp. 653 (E.D. La. 1974), 516 F. 2d 105 (6th Cir. 1975), because "the (Maher) Court pointed out there was no showing that the sales of property was impracticable, that commercial rental could not be provided a reasonable rate of return" (sic) (Appellant's Brief, p. 21). Appellant submits that no such showing has been made in the instant case either. In fact, as noted in the Amicus Brief at page 20, Appellee voluntarily evicted rent-paying tenants from the properties and has consistently refused to explore the possibilities of resale or renovation. In any case, the standards required by the Court in *Maher* are duplicated in Appellant's Ordinance. See Amicus' Brief at page 9. The *Maher* court, incidentally, upheld the *tout ensemble* concept in the face of plaintiff's argument that his particular structure possessed no historic or architectural value and thus did not fall within the aim of the historic preservation ordinance. The court, referring to *Pergament, supra,* stated:

> The protection of the 'quaint and distinctive character of the Vieux Carre' depends on more than the preservation of those buildings agreed to have great individual artistic or historical worth. Just as important is the preservation and protection of

> the setting or scene in which those comparatively few gems are situated. *Maher* v. *City of New Orleans, supra,* at 663.

Appellee is correct in stating that the *Maher* court refers to *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50 (1928) (Appellee's Brief, p. 21), but the case is cited to contrast to the procedural fairness afforded by the Vieux Carre regulatory scheme. It is incongruous to compare the neighborhood referendum disapproved in *Roberge* with the duly constituted regulatory body authorized by Appellant's Ordinance. Finally, in stating that the *Maher* court intended its decision to be narrow (Appellee's Brief, p. 22), Appellee overlooks the factual context in which the decision was rendered. The Plaintiff had asserted that the regulation, if valid, was a taking requiring just compensation. The court found no taking but agreed that regulation could in some cases be so onerous as to require compensation. In the instant action, Appellant is willing to compensate Appellee. Appellee's attempted distinction (Appellee's Brief, p. 22) of *Opinion of the Justices to the Senate,* 128 N. E. 2d 557 (Mass. 1955), and *Trustees of Sailors' Snug Harbor* v. *Platt,* 288 N. Y. S. 2d 314 (1968), flounders on similar grounds. Onerous regulation could amount to a taking and require compensation to be constitutionally permissible, but that is not to say that a taking with compensation is improper.

Appellant has not and will not attempt to distinguish cases holding that arbitrary power is impermissible. The issue of whether the Ordinance permits

arbitrary behavior has been adequately briefed both by Appellant, at pages 16-18 of its brief, and at pages 16-19 in the Amicus Brief. However, Appellant does contest Appellee's conclusion that the court below "held" the Commission's authority to be arbitrary or unconstitutional (Appellee's Brief, p. 27). The Opinion and Order below holds that without a specific appeal procedure the "state of suspended animation" imposed by the waiting period is constitutionally impermissible. TR 122-23. Appellant also contests the lower court's characterization of the waiting period. A property owner who has applied to the Commission for permission to demolish may certainly sell, alter, remodel, occupy and do anything else with his property, except tear it down until he receives approval from the Commission or until the six month negotiating period has expired. Appellee simply had no interest in altering, remodeling or occupying and was determined not to sell. TR 76.

IV. Since Appellant Has Initiated This Condemnation Action Under KRS 416.410, *Et. Seq.*, There Has as Yet Been No Taking of Appellee's Property.

There is no requirement under KRS 416.410, *et seq.*, for the condemnor to pay the amount of the Commissioners' appraisal to Appellee or to the court; the condemnor may elect to have a jury trial on the issue of the fair market value of the property to be taken. KRS 416.480 provides in part:

> All questions of fact pertaining to the amount of compensation to the owner, or owners, shall be

> determined by a jury, ... After a jury trial, and if possession previously has not been taken by the condemnor of the land and material condemned, it may do so upon the payment to the owner or to the clerk of the Circuit Court the amount of the compensation adjudged by the Circuit Court to be due the owner.

None of the cases relied on by Appellee on this issue is in point, since in each of those cases the property owner had been deprived of his realty without the benefit of an eminent domain proceeding.* In this case, no public interest in private property has been asserted without resort to judicial proceedings.

The law is settled that the initiation of a condemnation proceeding does not impose upon the condemnor the obligation of taking the property. *Commonwealth* v. *Morris,* Ky., 320 S. W. 2d 309 (1959). The initiation of the action does not impose legal restrictions on the land nor does it deprive the owner of possession or title to the property. *Id.,* at 311. The provisions of KRS 416.410, *et seq.,* allow the condemnor to abandon the condemnation action at any point short of the payment of an award into court or obtaining title and possession to the property. *Shelton* v. *Webster County Soil Conservation District, et al.,* Ky., 377 S. W. 2d 81 (1964).

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*The language from *United States* v. *General Motors Corp.*, 323 U. S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945), cited by Appellee at page 29 of its brief, is dicta. The Court cited *United States* v. *Welch*, 217 U. S. 333, 54 L. Ed. 787, 30 S. Ct. 527 (1910), and *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 58 L. Ed. 1088, 34 S. Ct. 654 (1914), for the proposition quoted by Appellee. However, *Welch* and *Richards* were both instances in which owners were deprived of a property interest without institution of eminent domain proceedings.

Even if Appellant's actions constituted a taking, it is readily apparent that there is no statutory requirement to pay money to anyone until the jury determines the valuation issue. The date of taking merely establishes the point in time at which the condemnee's interest in its property is to be valued. In other words, the jury will be charged to render a verdict ascertaining the fair market value of the property in question at the time of taking by Appellant. *Tharp* v. *Urban Renewal and Community Development Agency,* Ky., 389 S. W. 2d 453 (1965); *Commonwealth, Department of Highways* v. *Wood,* Ky., 380 S. W. 2d 73 (1964); *Commonwealth, Department of Highways* v. *Gibbs Enterprises, Inc.,* Ky., 437 S. W. 2d 763 (1969). Once the jury has made such a determination in the instant case, Appellant will have the burden of paying the constitutionally required "just compensation" to Appellee.

Appellee contends that its property was taken by Appellant pursuant to the entry of a Temporary Restraining Order on March 4, 1975. The Temporary Restraining Order gives neither title nor possession to Appellant. It merely restrains Appellee from "demolishing or altering" the property and preserves the status quo pending the determination of this action.

Assuming, however, that the Temporary Restraining Order constitutes a taking, the question becomes, what does Appellant owe Appellee at this point? There has been no jury determination of the fair market value of the property interest taken by the entry of the Temporary Restraining Order. Obviously, Appellant has not acquired fee simple title, nor has it gained posses-

sion of the property. Appellee can convey the property at any time. Appellant respectfully submits that it is impossible to ascertain what is owed absent the introduction of proof and a jury determination of an appropriate amount.

CONCLUSION

Appellee has failed to demonstrate that historic preservation is an improper object of an eminent domain proceeding or that this case constitutes an illegal use of the condemnation authority. Appellee has failed to show that its property has been or will be confiscated for private use. Appellee has not demonstrated that the constitutionality of the Historic Preservation Ordinance is a justiciable issue in this eminent domain proceeding, nor has it shown that the Ordinance is unconstitutional. There has been, at this point, no taking of Appellee's property. For all of these reasons, Appellant again asks that the lower court's judgment be reversed and that this action be remanded for jury trial of the value of the property to be condemned.

Respectfully submitted,

BURT J. DEUTSCH
Director of Law

CARSON P. PORTER
EDWARD S. CARLE
SALLIE S. HAYNES
Assistant Directors of Law
200 City Hall
Louisville, Kentucky 40202

Counsel for Appellant